IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.600 OF 2001

Prahlad Baijnath Pandit,)
Age 25, Occupn. Mason,)
residing at Gavandari,)
Chhota Hajipur, Badrajapur,)
Dist.-Matihari, Bihar,)
at present in Baroda Jail.).. Appellant
(Org.Accused)

Vs.

1. The State.)

2. Union Territory and Dadra)
& Nagar Haveli at Silvassa.).. Respondents

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Shri C.M.Kothari, Advocate for the appellant.

Smt.V.R.Bhonsale, APP for the State-Respondent No.1.

Shri Girish Agarwal, Advocate for respondent No.2.

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CORAM : N.V.DABHOLKAR &
SMT.V.K.TAHILRAMANI, JJ

DATED : 14TH FEBRUARY, 2006

ORAL JUDGMENT : (PER N.V.DABHOLKAR, J)

1. The Additional Sessions Judge, Silvassa, by his judgment and order dated 20th July, 2001 found the appellant guilty for the offence punishable under Section 302 of the Indian Penal Code, at the conclusion of Sessions Case No.4 of 2001. The

appellant is sentenced to suffer life imprisonment, pay fine of Rs.1,000/-, in default, rigorous imprisonment for 2 months. Feeling aggrieved by the said finding of guilty, conviction and sentence, the accused has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

2. According to the prosecution story, the incident took place on 15th September, 2000, sometime at about 9.30 p.m. Manjuben, victim of the incident, expired on 16th September, 2000 at 00.30 hrs. Manjuben is said to be living with the accused as his Mistress. In fact, earlier, Manjuben was married to someone else. She had begotten a son and a daughter from her former husband and she was divorced by her husband prior to resuming company with the accused. It has come in the evidence that the children were staying with grandmother Maina (PW 6), who is mother of the victim.

. It is the case of the prosecution that on 15th September, 2000 at about 9.30 p.m., the accused killed Manjuben by setting her on fire and he absconded thereafter. There being no eye witness, the prosecution relies on the circumstantial evidence and mainly upon the depositions of PW 3 Rambali and PW 4 Bablu. Bablu deposed that the accused had

visited him at 8.30 p.m. when the accused was in drunken condition. According to Rambali, the accused had come to his residence and informed him that his (accused's hut) was set fire. He, therefore, proceeded to extinguish the fire and accused was missing since the intimation to Rambali. Thus, accused was not available, either to extinguish the fire, or for the purpose of securing medical assistance to victim Manjuben. The prosecution does not seem to have any other circumstantial evidence also, upon which it can beneficially place reliance for establishing the guilt of the accused.

. PW 1 Dr.Amisha Desai was Medical Officer at Shree Vinoba Bhave Civil Hospital, who had performed post-mortem, whereafter, by the report (Exh.-13) she has opined, that the cause of death of Manjuben was **due to cardio respiratory arrest due to 99% second degree burns.** The death suffered by burn injuries is not disputed by the defence. PW 2 Gaman is brother of the victim and PW 6 Maina is mother. They were examined for the purpose of bringing on record that the accused threatened the victim Manjuben, about a week prior to the incident, that he would kill her.

. An attempt to examine child witness Surekha (daughter of victim, aged 3 years) was frustrated as

recorded by the trial Judge at Exhibit - 18. PW 8 Rameshbhai Gavit, PSI, is the Investigating Officer. PW 7 Vijay was Executive Magistrate. He had conducted the inquiry into the incident of unnatural death and he was examined for the purpose of his conclusion.

. The date on which the accused was arrested is a question of debate, but PSI Gavit had filed the chargesheet in the Court on 30th December, 2000 and the case ended in conviction as discussed above, after committal to the sessions Court.

3. The accused has not disputed his relationship with the victim. He has not denied that they were co-habiting at the location described by PW 3 Rambali and PW 4 Bablu. The accused has raised the plea of alibi, to some extent. According to him, he had left for Bhilad at 7.45 p.m. on that day. Thus, the accused claims that he was not present at home at about 9.30 p.m., when the incident is said to have occurred. Admissions obtained from the witness Rambali, supporting the possibility of absence of accused at the location since prior to the alleged incident, are also relied upon for the purpose. It was also suggested, that Rambali and his friend Bablu are trying to make out a false case in order to frame

the accused. This is because the accused was serving as Labourer at masonry contract of PW 3 Rambali. The accused showed inclination towards independent contract and Rambali had taken an exception to this intention. The accused, therefore, believes that the witnesses are deposing falsely against him.

4. On going through the impugned judgment, the trial Court has believed the evidence of PW 3 Rambali and PW 4 Bablu to arrive at a conclusion that the accused was at home on that day, he was in a drunken condition. As a result of reply to the questions put to him during the statement under Section 313 of the Code of Criminal Procedure, 1973, the learned Judge has observed that the accused and the victim being the only family members, is an admitted position. The defence that the accused had departed for Bhilad at 7.45 p.m., is rejected by the trial Judge, because accused has not explained the purpose for such departure. According to the trial Judge, the prosecution has proved the case to such an extent that the accused was obliged to offer an explanation about the occurrence, and since the accused had no explanation, but raised a false plea, that was an additional circumstance, supporting the prosecution. According to the learned Judge, absence of motive was insignificant, as the other circumstances duly proved

that, the accused has committed murder of victim. The trial Court accepted that there was unfair attempt on the part of the Investigating Officer to prepare false record regarding date of arrest of the accused.

5. We have heard Shri C.M.Kothari, learned counsel for the appellant and the learned APP for respondent No.1/State and Shri Girish Agarwal, the learned Advocate for respondent No.2. The respective lawyers together have apprised us of the entire evidence on record and also observations of the trial Court.

6. According to Shri Kothari, this being a case based only on circumstantial evidence, the prosecution is required to bring home the guilt by fulfilling the parameters laid down by the Apex Court in the matter of Sharad Birdhichand Sarada v. State of Maharashtra, reported in AIR 1984 SC 1622. Shri Kothari submitted that the prosecution must prove each and every circumstance beyond a reasonable doubt, by relying upon cogent evidence, all circumstances together must form a complete chain between the guilt and the accused, and such chain should keep no possibility open of any other hypothesis, except the guilt of the accused.

According to Shri Kothari, the prosecution has not been able to bring on record the motive. It has not been able to rule out the possibility of absence of accused at the locality on the alleged day. According to him, the evidence of PW 3 Rambali and PW 4 Bablu, which is crucially important, is not free from doubt and hence, the prosecution has not established the circumstances, on which it relied. He urged for acquittal, by pointing out that this is a fit case, wherein the accused is entitled to; at least, benefit of doubt.

. Shri Girish Agarwal, the learned Advocate for respondent No.2 started his campaign, by pointing out that the accused had raised a plea of alibi but has not established the same and consequently that has become a false plea. According to Shri Agarwal, inspite of some infirmities, the evidence of Rambali and Bablu, is reliable and since they established the presence of accused in the locality soon before the incident and they also established his absence while others were extinguishing Manjuben and transferred her to the Civil Hospital, the only inference that is required to be drawn, is that the accused set the victim on fire and absconded.

7. We must say that for the purpose of proving

guilt of the accused, the evidence of Investigating Officer is only of technical importance, and as we observed in the earlier paragraph, PW 8 Rameshbhai has already been condemned by the trial Court for being unfair for showing arrest of the accused to be on 1st October, 2000, although the accused was in police custody since 16th September, 2000. These observations are justified, in view of the admissions by PW 3 Rambali. Rambali has admitted in paragraph 7 that the accused was arrested on 16th September, 2000. According to him, he saw the accused 2-3 days after the death of Manjuben (may be on 18th or 19th September, 2000), while he was being taken towards latrin, by police. According to Rambali, he visited the police station on 3 to 4 occasions within a span of fortnight, since the death of Manjuben. If the version of Rambali is to be accepted, the criticism by the trial Court on the conduct of the Investigating Officer will have to be said to be justified. It may not be out of place to say that, an attempt on the part of Investigating Officer to show that the arrest was on 1st October, 2000, inspite of accused being in custody much earlier, is also a conduct which damages the prosecution story. This is because, the accused was absconding; is one of the circumstances, upon which the prosecution has placed heavy reliance. If such circumstance is tried

to be created by false evidence, such as, delayed arrest memo, the prosecution must suffer adverse inference for that.

8. If we take into consideration the evidence of PW 4 Bablu as acceptable, he only establishes that the accused was present in the locality at about 8.30 p.m.. This was prior to the alleged incident, said to have taken place at or about 9.30 p.m. According to Bablu, the accused was then in drunken condition, and the improvement that he was in heavily drunken condition need not be given much importance.

. If we take into account the evidence of PW 3 Rambali as acceptable, he establishes the following three circumstances:

(i) That accused approached him at his (Rambali's) residence and informed him that his (accused's) hut was on fire;

(ii) When Rambali and others went to the place of accused, Manjuben was seen on fire and the accused was absent;

(iii) Accused was not available even in the hospital, where Manjuben was taken for

treatment.

. If the circumstances which are tried to be established by deposition of these two witnesses, are accepted, those certainly lead to an inference that the accused must be a culprit. But the circumstances, upon which the prosecution relies are required to be established with firmness and by cogent evidence. Therefore, testing the reliability of Rambali and Bablu is must, before we place implicit reliance on their evidence.

9. On reference to cross-examination of Rambali, he has admitted in paragraph 4 as follows:-

> "On 15th Sept. 2000 the accused had gone to Rakholi to do masonary work. He worked there for about 2 to 3 days. I had asked the accused to come on for work at Athal, but he refused."

. Learned counsel for the appellant has placed reliance upon this admission of Rambali, and according to Shri Kothari, this should be sufficient to create probability that the accused may not be present in the locality on 15th September, 2000, when the alleged incident took place.

. We are in agreement with Shri Kothari, that the conduct attributed by Rambali to the accused, cannot be approved on the touchstone of natural conduct. It is said that accused approached Rambali in the hut of Rambali, and informed him that accused's hut was on fire. Ordinarily, a person trying to seek help of the neighbours in the vicinity on the disaster of fire would shout for help from the location and may not go to secure help from door to door. This deposition of Rambali stands falsified by admission in the cross-examination. Paragraph 9 of Rambali's deposition reads as under:-

> "It is true that Dubi Patel had shouted that there was fire. It is not correct to say that after hearing the shouts of Dubi Patel, Parmanend and myself left cooking and rushed outside to see the fire."

. When we refer to evidence of Bablu, it can be confirmed that story of Dubi Patel raising shouts and then witnesses gathering there is true, and later half of the quotation above, is an attempt on the part of Rambali to stick to his own narration as in the chief examination. He has realised little belatedly, that admission would be against the narration that accused

himself had come to Rambali's residence and informed about his own hut being on fire. Bablu in his chief examination itself, narrates that Dubi Patel, Vinod and Bablu together, were cooking food and then Bablu settled down to watch T.V. at about 9.30 p.m. At that time, Dubi Patel went outside. It was Dubi Patel, who saw the fire first and shouted. Upon hearing the shouts of Dubi Patel, Rambali, Parmanand, Kamlesh and Bablu went to the location and they saw that Manjuben was on fire and accused was not present.

. If we take these variances between the evidence of Rambali and Bablu, so also the chief-examination and cross-examination of Rambali, it is evident that deposition of Rambali about accused having gone to Rambali's hut and having informed Rambali about the fire, is required to be disbelieved and that is another unfair conduct on the part of the prosecution.

10. PW 2 Gaman and PW 6 Maina (brother and mother of victim, respectively) are examined in order to demonstrate that accused had intended killing of Manjuben, since a week prior to the alleged incident. For the sake of argument, even if we accept the evidence of Gaman as true and threat by accused to Manjuben, as narrated by him, to be also true, that

would prove counter productive for the prosecution.

Gaman says :-

> "The deceased Manju used to tell us that the accused had threatened her of death in case she would not reside with him."

If the portion underlined hereinabove is taken into consideration, that reflects keen desire of accused to cohabit with the victim.

. When we refer to paragraph 7 of deposition of Gaman, it is evident, that during the inquiry by Sub-Divisional Magistrate, he has narrated that accused was maintaining deceased Manjuben properly, he was neither beating nor illtreating her. He has also narrated that accused used to visit the relatives of deceased Manjuben and also used to behave properly with the deceased. Although from the witness box, Gaman contradicts this portion, defence having brought it on record as contradiction, it can take assistance of the same in order to demonstrate that the couple was cohabiting happily, and there was no reason for the accused to kill Manjuben. The evidence of mother Maina is not much different than that of Gaman. She has also narrated before Sub-Divisional Magistrate that there was no quarrel between the accused and the

deceased Manjuben, Manjuben was being properly maintained.

. Nodoubt, motive being internal state of mind, in every case, prosecution may not be able to establish motive of the accused. However, motive assumes importance in the cases based on circumstantial evidence. In case, prosecution is able to establish the motive, that lends a strong support to the prosecution story. Although, absence of proof of motive may not cause failure of prosecution story, on that count itself, that becomes at least a weakness of the prosecution story.

11. On going through the evidence of Investigating Officer, it is clear that no assistance is sought from the forensic laboratory, although the articles at the location were seized. It must be borne in mind that ordinarily, in cases of death by accidental fire, clothes of victim as also surrounding area may not give out smell of kerosene, because the same is not required to be used in cases of accident. Such articles may give out smell of kerosene in the cases of homicide as also suicide. The prosecution by not sending the articles for analysis, has failed to rule out the possibility of accident. The presence of kerosene residue in the articles would have ruled out

accident.

12. Last but not the least, as demonstrated earlier, Dubi Patel was the person, in all probabilities, reached first at the location. Dubi Patel raised shouts and then every one, including PW 3 Rambali and PW 4 Bablu reached the location. The prosecution had recited Dubi Patel in the witness list but has not examined him. If the story that Dubi Patel shouted and then all others gathered is true, then version of PW 3 Rambali that accused had come and called Rambali and informed him that the accused's hut was on fire stands falsified and prosecution owes one more explanation for presenting false evidence before the Court.

13. As rightly submitted by the learned APP, when the accused raises a positive defence, burden of proof lies upon the accused. Plea of alibi being positive defence of accused, he is required to lead evidence. But we cannot start from the wrong end. The accused can be invited to establish positive defence raised by him, only if the prosecution establishes its case on its own evidence, without reference to defence of the accused, much less to failure of defence.

14. We have found deposition of Rambali to be

doubtful. There is no motive on record for which accused could have killed Manjuben, on the contrary, there is reason to believe that they were cohabiting happily and accused intensely desired the company of the deceased. The admission of Rambali has made a room for possibility of absence of accused. The prosecution has denied itself, corroboration in the form of chemical analyser's report. Non-examination of Dubi Patel, the first person to reach the scene of occurrence, also makes the prosecution liable for adverse inference.

15. As a cumulative effect of all the above details, we find the evidence of Rambali, not corroborated by corroboration that could have been available, to be unsafe to rely upon and, therefore, this one to be a case for benefit of doubt.

16. The appeal is therefore allowed. The judgment and order dated 20th July, 2001 delivered by the Additional Sessions Judge, Dadra and Nagar Haveli, Silvassa, thereby holding the appellant Prahlad Baijnath Pandit guilty of offence punishable under Section 302 of I.P.C. is quashed and set aside. The appellant is acquitted. He be set to liberty forthwith, if not required in any other cases.

. The Registrar (Judicial) shall ensure early despatch of suitable writ.

(V.K.TAHILRAMANI,J) (N.V.DABHOLKAR,J)